187 (2)

No. 10-1212

In The

# Supreme Court of the United States

MELISSA J. STINE,

*Petitioner,*

v.

RICK A. YARNALL,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF IN OPPOSITION

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## STATEMENT OF THE CASE

The parties do not dispute the facts in this matter. Petitioner Stine prevailed in having the Bankruptcy Court confirm her Chapter 13 plan over the objection of respondent, Chapter 13 Trustee Yarnall. When Trustee Yarnall appealed the order confirming the plan, debtor Stine failed to appear or object before the Bankruptcy Appellate Panel ("BAP") of the Ninth Circuit Court of Appeals. She designated no items for inclusion in the record on appeal, and filed no papers of any sort. The BAP issued a conditional order of waiver granting petitioner, and the other appellees in the proceedings, an additional period of time in which to file a reply brief. The conditional order provided that, unless petitioner complied in a timely manner, she waived her right to file a brief or appear at oral argument. Petitioner persisted in failing to file a reply brief despite being granted an extension of time in which to do so, and the conditional order became final. Thus Petitioner Stine, knowingly and with notice, waived her right to participate.

Trustee Yarnall prevailed at the BAP and obtained a reversal of the bankruptcy court order confirming debtor Stine's plan. When the debtor appealed to the Ninth Circuit Court of Appeals, the Circuit Court dismissed her appeal on the grounds that "attendance and objection" at the prior proceedings were "prerequisites" for standing to appeal. Debtor Stine then filed her petition for writ of certiorari to review the judgment of the Ninth Circuit.

## REASONS FOR DENYING THE WRIT OF CERTIORARI AND AFFIRMING THE JUDGMENT OF THE NINTH CIRCUIT

### THE NINTH CIRCUIT COURT OF APPEALS WAS CORRECT IN DISMISSING DEBTOR STINE'S APPEAL FOR FAILURE TO ATTEND AND OBJECT IN THE PROCEEDINGS BEFORE THE BANKRUPTCY APPELLATE PANEL OF THE NINTH CIRCUIT

On issues relating to compliance with procedure, the Ninth Circuit Court of Appeals has found consistently that a party in bankruptcy proceedings must meet procedural requirements or face dismissal. The Ninth Circuit, together with the Seventh and Tenth Circuits, has held that appearance and objection are prerequisites for standing as a "person aggrieved" in bankruptcy appeals.

In essence, petitioner has advocated a laissez-fair approach to appellate practice in which a party may, without penalty or excuse, abandon participation at the BAP level or district court exercising appellate jurisdiction over bankruptcy proceedings. Having failed to submit a brief to the BAP, a party would still have the recourse of appealing to the circuit court with no adverse consequences. In this scenario, Petitioner has envisioned an appellate system in which noncompliance has no downside, and compliance confers few advantages.

The Ninth Circuit has required appearance and participation as requirements for appellate standing even before Congress amended the Bankruptcy Act in 1938 to include the "person aggrieved" test in section 39(c). 11 U.S.C. § 67(c) (repealed 1978). The decision

of a district court in the circuit, *In re Peppers Fruit Co.*, 24 F. Supp. 119 (D. S.D. Ca. 1938), applied the normal federal "party or privy" test for standing and stated that it "felt that, in the interest and economy and efficiency of administration of bankruptcy estates, reviews from referees' orders, at least those orders which are made after notice, should be limited to applications by parties who have appeared at the hearing before the referee and participated therein." *Id.* at 121-22, cited by *In re Commercial Western Finance Corp.*, 761 F.2d at 1334-35. The requirement of attendance and objection, after due notice, as a limitation on the people who have standing to appeal in the bankruptcy system has been recognized by scholarly commentary. R. Levin, *Bankruptcy Appeals*, 58 N.C.L.Rev. 967, 978 (1980). Petitioner Stine does not claim that she lacked notice of the requirement to file a reply brief before the BAP.

Petitioner argues that her appeal to the Ninth Circuit Court of Appeals should not have been dismissed because the relevant issues and record had been fully set forth in the bankruptcy court. However, any issues or portions of the record Petitioner desired the BAP to address were not set forth before the BAP. By failing to file a reply brief in a timely manner, and persisting in this failure after the bankruptcy panel granted her additional time to comply, Petitioner waived the right to file a brief, raise additional issues or complain about the result. Petitioner's issues were not properly before the Court of Appeals because she never briefed them before the Bankruptcy Appellate Panel. *See In re Pine Mountain, Ltd.*, 80 B.R. at 173; *Energrey Enters.*, 119 B.R. at 741. Petitioner's willful noncompliance with

appellate procedure offered the Ninth Circuit no reasonable alternative but to dismiss her appeal.

Trustee contends that the failure to participate at the lower level appellate court waives any standing to bring this appeal before the Ninth Circuit. Parties should not be allowed to simply sit back and watch to determine if they are going to be happy with the outcome of an appeal. The Ninth Circuit Court has likened this type of behavior to the industry Nevada is known for:

> Federal courts are not run like a casino game in which players may enter and exit on pure whim. A defaulted party may not re-enter litigation, particularly on appeal, on sheer caprice. It must follow proper procedure to set aside the default.

*In re Lam*, 192 F.3d 1309, 1311 (C.A.9, 1999).

The context of the appeal on *Lam* was a creditor that "appeals the merits of an intermediate appellate decision although it did not bother to appear in that appeal." *Id.* at 1311. We have a similar situation in this appeal where the debtor did not participate at the BAP, but then appealed that decision to the Ninth Circuit, which dismissed the appeal for Debtor's failure to participate at the BAP level.

Also similar to the cases before the Court in this matter, the Illinois District Court in *In re Schwinn* found that a party on notice to a proceeding who chooses not to participate cannot later complain about the result:

> When a party to litigation receives notice that a matter will be heard, it is his duty to appear

> at the hearing and present to the court evidence and legal authorities which will be of aid to the court in making its decision. If he does not do so, the court must make its decision without the benefit of any evidence which such person might have made available, and the court must act upon the presumption that persons who are absent are not interested in the matter before it or will be satisfied with such decision as the court may make. To permit persons who did not participate in proceedings of which they are on notice to complain of the result of such proceedings would cause unlimited confusion and even disrespect of the courts and their authority.
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> *In re Schwinn*, 209 B.R. at 892, quoting *In re Mifflinburg Body Co.*, 54 F.Supp. 560, 561 (M.D.Pa.1944).

Debtor Appellant in this case does not and cannot claim she did not have notice of the BAP appeal. Nor can she claim she did not have the opportunity to participate in the BAP appeal. Rather she *chose* not to participate. At this late juncture, she should not be permitted to suddenly re-appear because the last result was not to her liking. Where would the line be drawn if an appellant is permitted to just sit back and watch?

## CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be denied and the dismissal by the Ninth Circuit Court of Appeals should remain undisturbed.

Respectfully submitted,

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